

PROPOSALS FOR 2009

1. Sections 5211, 7211, and 9211 Specified Director for Quorum and Directors with a Conflict – Brad Clark – not voted on

§§ 5211(b), 7211(b) and 9211(b) would be amended to eliminate an ambiguity in the last sentence of the first two sections, to add a corresponding last sentence to § 9211(b) and make other changes as indicated in the section texts below.

The ambiguity arises because, using § 5211 as an example, it is not entirely clear whether the phrase “ ‘ . . . interested director’ as defined in Section 5233, . . . ” as used in subdivision (b) of 5211(b) means (1) simply a director who has a material financial interest in a transaction to which the corporation is a party, i.e., without regard to whether § 5233 applies to the transaction or remedies under its subsection (h) are available, or (2) whether it only means such a director in a transaction that is covered by § 5233 because the exclusionary provisions of § 5233(d) do not apply or the remedies in § 5233(h) would be available. It is important to remove this ambiguity because a consent presumably will not be valid unless a director who appears to be excused from signing it and does not do so actually falls within whatever the correct definition is.

The changes in Corp. Code § 5233(b) do not apply to three specified types of transactions approval of which would not seem to necessitate nonparticipation of a director. The third of these three clearly would not trigger abstention of an “interested” director from voting because it refers to a transaction of which the interested director or directors have no actual knowledge and which does not exceed specified amounts.

There is also a gap not presently covered by these three subsections. A director who is a “common director” under Corp. Code § 5234 may quite properly want to abstain from voting on any transaction between a corporation of which he is a director and another corporation or business of which he is also a director: the transaction may be void or voidable unless the disclosures described in § 5234(a) (1) are made and the board approves the transaction as set forth in that subsection or the transaction is just and reasonable as to the corporation when authorized. The changes in §§ 5211(b), etc. include changes designed to prevent the existence of a “common director” in a transaction from creating doubt as to its validity.

It seems desirable to clarify the ambiguity by making the definition described in (2) above applicable. A board should not approve, and an interested director should not allow approval of, a transaction by unanimous consent with or without his or her participation except with appropriate disclosures and other actions. This is because without them, an “interested director” of a public benefit corporation may be exposed to the liabilities provided in § 5233(h) and the transaction may be void or voidable under § 5234 if the director is a common director under that Section. Further, in any such case, to protect validity of the transaction, the corporation would need to evidence adequately in the consent form or its other records the existence of a material financial interest and the disclosures and other actions taken, in case either the validity of the written consent is challenged or the applicability of § 5233 or § 5234 is asserted.

Sections 5211(b), 7211(b) and 9211(b) should warn the users of unanimous consents of the respective problems and prescribe the solution for proper use of the Sections.

Some years ago the Corporations Committee caused changes in the then somewhat corresponding provision, § 307(b), in the General Corporation Law to avoid these problems. That Section has some drafting problems but seems to be a good starting point for changes in our Nonprofit Corporation Law sections. The language of § 307(b) also seeks to cure another problem with which our Nonprofit Corporation sections should deal, by articulating the requirement that the number of directors of the board serving at the time of the written consent constitutes a quorum. If for some reason the number of directors in office does not constitute a quorum and they desire only to fill vacancies on the board, a written consent could be used to do that notwithstanding a requirement in our three sections as to a quorum just described because Corp. Code Section 5224(a) permits filling of vacancies on a board by “the unanimous written consent of the directors then in office”.

Attached are Sections 5211, 7211 and 9211 as they presently exist, with subsection (b), as to director’s actions by written consent set up in the form for a legislative bill, with new material in italics and deleted material in strikethrough type. As enclosed, the attachments also include the other portions of those sections as to which amendments are pending, namely, subsections (a) (7) and (c). In that connection, as to subsection (a) (7), I thought in looking at it that one change is necessary and I have made it subject to your approval. The change is to add after the word “death” in the fourth line the words “or other non-incumbency”. I added this because it seemed to me that death of a specified director is not the only exception to the requirement that the specified director be present to constitute a quorum; there could be no incumbent specified director not only because of his or her death but also because of non-appointment, resignation or even removal without replacement.

5211. (a) Unless otherwise provided in the articles or in the bylaws, all of the following apply:

(1) Meetings of the board may be called by the chair of the board or the president or any vice president or the secretary or any two directors.

(2) Regular meetings of the board may be held without notice if the time and place of the meetings are fixed by the bylaws or the board. Special meetings of the board shall be held upon four days’ notice by first-class mail or 48 hours’ notice delivered personally or by telephone, including a voice messaging system or by electronic transmission by the corporation (Section 20). The articles or bylaws may not dispense with notice of a special meeting. A notice, or waiver of notice, need not specify the purpose of any regular or special meeting of the board.

(3) Notice of a meeting need not be given to a director who provides a waiver of notice or consent to holding the meeting or an approval of the minutes thereof in writing, whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to that director. These waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meetings.

(4) A majority of the directors present, whether or not a quorum is present, may adjourn any meeting to another time and place. If the meeting is adjourned for more than 24 hours, notice of an adjournment to another time or place shall be given prior to the time of the adjourned meeting to the directors who were not present at the time of the adjournment.

(5) Meetings of the board may be held at a place within or without the state that has been designated in the notice of the meeting or, if not stated in the notice or there is no notice, designated in the bylaws or by resolution of the board.

(6) ~~Members of the board~~ Directors may participate in a meeting through use of conference telephone, electronic video screen communication or electronic transmission by and to the corporation (Sections 20 and 21). Participation in a meeting through use of conference telephone or electronic video screen communication pursuant to this subdivision constitutes presence in person at that meeting as long as all ~~members~~ directors participating in the meeting are able to hear one another. Participation in a meeting through use of electronic transmission by and to the corporation, other than conference telephone and electronic video screen communication, pursuant to this subdivision constitutes presence in person at that meeting if both of the following apply:

(A) Each ~~member~~ director participating in the meeting can communicate with all of the other ~~members~~ directors concurrently.

(B) Each ~~member~~ director is provided the means of participating in all matters before the board, including, without limitation, the capacity to propose, or to interpose an objection to, a specific action to be taken by the corporation.

(7) A majority of the number of directors authorized in *or pursuant to* the articles or bylaws constitutes a quorum of the board for the transaction of business. *The articles or bylaws may require the presence of one or more specified directors in order to constitute a quorum of the corporation to transact business, as long as the death or other non-incumbency of such specified director or directors or the death or nonexistence of the person or persons otherwise authorized to appoint or designate that director does not prevent the corporation from transacting business in the normal course of events.* The articles or bylaws may not provide that a quorum shall be less than one-fifth the number of directors authorized in *or pursuant to* the articles or bylaws, or less than two, whichever is larger, unless the number of directors authorized in *or pursuant to* the articles or bylaws is one, in which case one director constitutes a quorum.

(8) Subject to the provisions of Sections 5212, 5233, 5234, 5235, and subdivision (e) of Section 5238, an act or decision done or made by a majority of the directors present at a meeting duly held at which a quorum is present is the act of the board. The articles or bylaws may not provide that a lesser vote than a majority of the directors present at a meeting is the act of the board. A meeting at which a quorum is initially present may continue to transact business notwithstanding the withdrawal of directors, if any action taken is approved by at least a majority of the required quorum for that meeting, or a greater number required by this division, the articles or *the* bylaws.

(b) An action required or permitted to be taken by the board may be taken without a meeting, if all ~~members of the board~~ directors shall individually or collectively consent in writing to that action; *and, subject to subdivision (a) of Section 5224, if the number of directors serving at the time constitutes a quorum.* The written consent or consents shall be filed with the minutes of the proceedings of the board. The action by written consent shall have the same force and effect as the unanimous vote of the directors. For purposes of this subdivision only, “all ~~members of the board~~ directors” does not include an “interested director” as defined in subdivision (a) of Section 5233; *or a “common director” as described in subdivision (b) of Section 5234 who abstains in writing from providing consent, where (1) the facts described in paragraph (2) or (3) of subdivision (d) of Section 5233 are established or the provisions of paragraph (1) or (2) of subdivision (a) of Section 5234 are satisfied, as appropriate, at or prior to execution of the written consent or consents, (2) the establishment of those facts or satisfaction of those*

provisions, as applicable, is included in the written consent or consents executed by the noninterested or noncommon directors or in other records of the corporation, and (3) the noninterested or noncommon directors, as applicable, approve the action by a vote that is sufficient without counting the votes of the interested or common directors. If written consent is provided by the directors in accordance with the immediately preceding sentence and the facts established or the disclosures made regarding the action that is the subject of the consent do not comply with the requirements of Section 5233 or 5234 described above, as applicable, the action that is the subject of the consent shall be deemed approved, but in any suit brought to challenge the action, the party asserting the validity of the action shall have the burden of proof in establishing that the action was just and reasonable to the corporation at the time it was approved.

(c) Each director present and voting at a meeting shall have one vote on each matter presented to the board for action at that meeting. No director may vote at any meeting by proxy.

(d) The provisions of this section apply also to incorporators, to committees of the board, and to action by those incorporators or committees mutatis mutandis.

7211. (a) Unless otherwise provided in the articles or in the bylaws, all of the following apply:

(1) Meetings of the board may be called by the chair of the board or the president or any vice president or the secretary or any two directors.

(2) Regular meetings of the board may be held without notice if the time and place of the meetings are fixed by the bylaws or the board. Special meetings of the board shall be held upon four days' notice by first-class mail or 48 hours' notice delivered personally or by telephone, including a voice messaging system or by electronic transmission by the corporation (Section 20). The articles or bylaws may not dispense with notice of a special meeting. A notice, or waiver of notice, need not specify the purpose of any regular or special meeting of the board.

(3) Notice of a meeting need not be given to a director who provided a waiver of notice or consent to holding the meeting or an approval of the minutes thereof in writing, whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to that director. These waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meetings.

(4) A majority of the directors present, whether or not a quorum is present, may adjourn any meeting to another time and place. If the meeting is adjourned for more than 24 hours, notice of an adjournment to another time or place shall be given prior to the time of the adjourned meeting to the directors who were not present at the time of the adjournment.

(5) Meetings of the board may be held at a place within or without the state that has been designated in the notice of the meeting or, if not stated in the notice or if there is no notice, designated in the bylaws or by resolution of the board.

(6) ~~Members of the board~~ Directors may participate in a meeting through use of conference telephone, electronic video screen communication, or electronic transmission by and to the corporation (Sections 20 and 21). Participation in a meeting through use of conference telephone or electronic video screen communication pursuant to this subdivision constitutes presence in person at that meeting as long as all ~~members~~ directors participating in the meeting are able to hear one another. Participation in a meeting through use of electronic transmission by and to the corporation, other than conference telephone and electronic video screen communication, pursuant to this subdivision constitutes presence in person at that meeting if both of the following apply:

(A) Each ~~member~~ *director* participating in the meeting can communicate with all of the other ~~members~~ *directors* concurrently.

(B) Each ~~member~~ *director* is provided the means of participating in all matters before the board, including, without limitation, the capacity to propose, or to interpose an objection to, a specific action to be taken by the corporation.

(7) A majority of the number of directors authorized in *or pursuant to* the articles or bylaws constitutes a quorum of the board for the transaction of business. *The articles or bylaws may require the presence of one or more specified directors in order to constitute a quorum of the corporation to transact business, as long as the death or other non-incumbency of such specified director or directors or the death or nonexistence of the person or persons otherwise authorized to appoint or designate that director does not prevent the corporation from transacting business in the normal course of events.* The articles or bylaws may not provide that a quorum shall be less than one-fifth the number of directors authorized in *or pursuant to* the articles or bylaws, or less than two, whichever is larger, unless the number of directors authorized in *or pursuant to* the articles or bylaws is one, in which case one director constitutes a quorum.

(8) Subject to the provisions of Sections 7212, 7233, 7234, and subdivision (e) of Section 7237 and Section 5233, insofar as it is made applicable pursuant to Section 7238, an act or decision done or made by a majority of the directors present at a meeting duly held at which a quorum is present is the act of the board. The articles or bylaws may not provide that a lesser vote than a majority of the directors present at a meeting is the act of the board. A meeting at which a quorum is initially present may continue to transact business notwithstanding the withdrawal of directors, if any action taken is approved by at least a majority of the required quorum for that meeting, or a greater number required by this division, the articles or *the* bylaws.

(b) An action required or permitted to be taken by the board may be taken without a meeting, if all ~~members of the board~~ *directors* shall individually or collectively consent in writing to that action; *and, subject to subdivision (a) Section 7224, if the number of directors then in office constitutes a quorum.* The written consent or consents shall be filed with the minutes of the proceedings of the board. The action by written consent shall have the same force and effect as the unanimous vote of the directors. For purposes of this subdivision only, “all ~~members of the board~~ *directors*” does not include an “interested director” as defined in subdivision (a) of Section 5233, insofar as it is made applicable pursuant to Section 7238; *or a “common director” as described in subdivision (b) of Section 7233 who abstains in writing from providing consent, where (1) the facts described in paragraph (2) or (3) of subdivision (d) of Section 5233 are established or the provisions of paragraph (1) or (2) of subdivision (a) of Section 7233 are satisfied, as appropriate, at or prior to execution of the written consent or consents, (2) the establishment of those facts or satisfaction of those provisions, as applicable, is included in the written consent or consents executed by the noninterested or noncommon directors or in other records of the corporation, and (3) the noninterested or noncommon directors, as applicable, approve the action by a vote that is sufficient without counting the votes of the interested or common directors. If written consent is provided by the directors in accordance with the immediately preceding sentence and the facts established or the disclosures made regarding the action that is the subject of the consent do not comply with the requirements of Section 5233 or 7233 described above, as applicable, the action that is the subject of the consent shall be deemed approved, but in any suit brought to challenge the action, the party asserting the validity of the action shall have the burden of proof in establishing that the action was just and reasonable to the corporation at the time it was approved.*

(c) Each director present and voting at a meeting shall have one vote on each matter presented to the board for action at that meeting. No director may vote at any meeting by proxy.

(d) This section applies also to incorporators, to committees of the board, and to action by those incorporators or committees mutatis mutandis.

9211. (a) Unless otherwise provided in the articles or in the bylaws, all of the following apply:

(1) Meetings of the board may be called by the chair of the board or the president or any vice president or the secretary or any two directors.

(2) Regular meetings of the board may be held without notice if the time and place of the meetings are fixed by the bylaws or the board. Special meetings of the board shall be held upon four days' notice by first-class mail or 48 hours' notice delivered personally or by telephone, including a voice messaging system or by electronic transmission by a corporation (Section 20). The articles or bylaws may not dispense with notice of a special meeting. A notice, or waiver of notice, need not specify the purpose of any regular or special meeting of the board.

(3) Notice of a meeting need not be given to a director who provided a waiver of notice or consent to holding the meeting or an approval of the minutes thereof in writing, whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to that director. These waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meetings.

(4) A majority of the directors present, whether or not a quorum is present, may adjourn any meeting to another time and place.

(5) Meetings of the board may be held at a place within or without the state that has been designated in the notice of the meeting or, if not stated in the notice or there is no notice, designated in the bylaws or by resolution of the board.

(6) ~~Members of the board~~ Directors may participate in a meeting through use of conference telephone, electronic video screen communication, or electronic transmission by and to the corporation. Participation in a meeting through use of conference telephone or electronic video screen communication pursuant to this subdivision constitutes presence in person at that meeting as long as all long as all ~~members~~ directors participating in the meeting are able to hear one another. Participation in a meeting through use of electronic transmission by and to the corporation, other than conference telephone and electronic video screen communication pursuant to this subdivision constitutes presence in person at that meeting, if both of the following apply:

(A) Each ~~member~~ director participating in the meeting can communicate with all of the other ~~members~~ directors concurrently.

(B) Each ~~member~~ director is provided the means of participating in all matters before the board, including, without limitation, the capacity to propose, or to interpose an objection to, a specific action to be taken by the corporation.

(7) A majority of the number of directors authorized in *or pursuant to* the articles or bylaws constitutes a quorum of the board for the transaction of business.

The articles or bylaws may require the presence of one or more specified directors to constitute a quorum of the board to transact business, as long as the death or other non-incumbency of a director or the death or nonexistence of the person or persons otherwise authorized to appoint or designate that director does not prevent the corporation from transacting business in the normal course of events.

(8) An act or decision done or made by a majority of the directors present at a meeting duly held at which a quorum is present is the act of the board. The articles or bylaws may not provide that a lesser vote than a majority of the directors present at a meeting is the act of the board. A meeting at which a quorum is initially present may continue to transact business notwithstanding the withdrawal of directors, if any action taken is approved by at least a majority of the required quorum for that meeting, or a greater number as is required by this division, the articles or bylaws.

(b) An action required or permitted to be taken by the board may be taken without a meeting, if all ~~members of the board~~ directors shall individually or collectively consent in writing to that action; *and if, subject to subdivision (a) of Section 9224, the number of directors serving at the time constitutes a quorum.* The written consent or consents shall be filed with the minutes of the proceedings of the board. The action by written consent shall have the same and effect as the unanimous vote of the directors. *For purposes of this subdivision only, "all directors" does not include an "interested director" as defined in subdivision (a) of Section 9243 or a "common director" as described in subdivision (b) of Section 9244 who abstains in writing from providing consent, where (1) the facts described in paragraph (2) or (3) of subdivision (d) of Section 9243 are established or the provisions of paragraph (1) of subdivision (a) of Section 9244 are satisfied, as appropriate, at or prior to execution of the written consent or consents, (2) the establishment of those facts or satisfaction of those provisions, as applicable, is included in the written consent or consents executed by the noninterested or noncommon directors or in other records of the corporation, and (3) the noninterested or noncommon directors, as applicable, approve the action by a vote that is sufficient without counting the votes of the interested or common directors. If written consent is provided by the directors in accordance with the immediately preceding sentence and the facts established or the disclosures made regarding the action that is the subject of the consent do not comply with the requirements of Section 9243 or 9244 described above, as applicable, the action that is the subject of the consent shall be deemed approved, but in any suit brought to challenge the action, the party asserting the validity of the action shall have the burden of proof in establishing that the action was just and reasonable to the corporation at the time it was approved.*

(c) Each director present and voting at a meeting shall have one vote on each matter presented to the board ~~of directors~~ for action at that meeting. No director may vote at any meeting by proxy.

(d) This section applies also to incorporators, to committees of the board, and to action by those incorporators or committees mutatis mutandis.

2. Sections 5212, 7212, 9212, 5213, 7213, 9213, 5235, 6321, 8321, 6324, 8324, and 18300 NIA Provisions – Pat Whaley, Gary Wollberg, and Martin Trupiano – approved w/o change

The purpose of this Proposal is to provide cross-references in the Corporations Code to alert practitioners to the important requirements contained in section 12586 of the Government Code substantially affecting governance of nonprofit corporations.

Section 12586 of the Government Code contains three subdivisions which are addressed by this Proposal. Subdivision (a) requires a charitable organization to submit reports to the Attorney General regarding the assets it is holding for charitable purposes in addition to the annual report to members. Subdivision (e), added by the 2004 amendment, imposes two new

requirements on charitable organizations with gross revenue, as defined, in excess of \$2 million. Subdivision (e)(1) requires the preparation annual financial statements using generally accepted accounting principles that are audited by an independent certified public accountant in conformity with generally accepted auditing standards. That subdivision also requires the public disclosure of the audited statements financial statements.

Subdivision (e)(2) requires the board of directors to appoint an audit committee with specific limitations on its membership and describes certain duties to be fulfilled by the audit committee. Under subdivision (e)(2), the audit committee may include non-board members but may not include any member of the staff, including the president or chief executive officer and the treasurer or chief financial officer, or any person who has a material financial interest in any entity doing business with the charitable organization. The chair of the audit committee may not be a member of the finance committee, and members of the finance committee must constitute less than half of the audit committee.

Subdivision (e)(2) also specifies the duties of the audit committee. Subject to the supervision of the board of directors, the audit committee shall be responsible for (1) recommending to the board of directors the retention and termination of the independent auditor; (2) negotiating the independent auditor's compensation on behalf of the board of directors; (3) conferring with the auditor to satisfy the audit committee members that the financial affairs of the corporation are in order; (4) reviewing and determining whether to accept the audit; and (5) assuring that any nonaudit services performed by the auditing firm conform with standards for auditor independence; and (6) approving performance of nonaudit services by the auditing firm.

Subdivision (g) of Section 12586, also added by the 2004 amendment, requires the board of directors of charitable organizations to review and approve the compensation, including benefits, of the president or chief executive officer and the treasurer or chief financial officer to assure that it is just and reasonable. This review and approval shall occur (1) initially upon the hiring of the officer, (2) whenever the term of employment, if any, of the officer is renewed or extended, and (3) whenever the officer's compensation is modified.

This Proposal aims to alert practitioners to the existence of these significant laws affecting the organization, governance and reporting obligations of charitable organizations that are within the subject matter scope of existing sections of the Corporations Code but which were codified in the Government Code. By including cross-references in the pertinent Corporations Code section to the related section in the Government Code, practitioners will receive notice that a charitable organization may have additional obligations, stated in the Government Code, regarding committee structures, reporting obligations and executive compensation decisions.

By providing cross-references in the Corporations Code to the Government Code, practitioners' level of professional service to their clients will be enhanced to assuring they are aware of significant obligations of charitable organizations which do not appear in the Corporations Code. The cross-references will also contribute to the goal of the Nonprofit Integrity Act of 2004, of which Section 12586 is a part, to help assure compliance with its provisions so that the public's confidence in the financial integrity of charitable organization is enhanced. Finally, the Proposal seeks to avoid inadvertent non-compliance with Section 12586

which may result in late filing penalties (Section 12586.1 of the Government Code), the suspension or revocation of the registration of a charitable organization (Government Code Section 12598(e)(1)), payment of the Attorney General's attorneys' fees and costs (Government Code Section 12598(b)), and civil or criminal penalties (Government Code Section 12591.1). Given the importance of subdivisions (a), (e) and (g) of Section 12586 of the Government Code to a charitable organization's obligations regarding committee structures, reporting obligations and executive compensation decisions, cross-references from the Corporations Code to the Government Code are an easy way to assure awareness and fulfillment of a charitable organization's statutory obligations.

TEXT OF PROPOSAL

5212. (a) The board may, by resolution adopted by a majority of the number of directors then in office, provided that a quorum is present, create one or more committees, each consisting of two or more directors, to serve at the pleasure of the board. Appointments to such committees shall be by a majority vote of the directors then in office, unless the articles or bylaws require a majority vote of the number of directors authorized in the articles or bylaws. The bylaws may authorize one or more committees, each consisting of two or more directors, and may provide that a specified officer or officers who are also directors of the corporation shall be a member or members of such committee or committees. The board may appoint one or more directors as alternate members of any committee, who may replace any absent member at any meeting of the committee. Any such committee, to the extent provided in the resolution of the board or in the bylaws, shall have all the authority of the board, except with respect to:

(1) The approval of any action for which this part also requires approval of the members (Section 5034) or approval of a majority of all members (Section 5033).

(2) The filling of vacancies on the board or in any committee which has the authority of the board.

(3) The fixing of compensation of the directors for serving on the board or on any committee.

(4) The amendment or repeal of bylaws or the adoption of new bylaws.

(5) The amendment or repeal of any resolution of the board which by its express terms is not so amendable or repealable.

(6) The appointment of committees of the board or the members thereof.

(7) The expenditure of corporate funds to support a nominee for director after there are more people nominated for director than can be elected.

(8) The approval of any self-dealing transaction except as provided in paragraph (3) of subdivision (d) of Section 5233.

(b) Subdivision (a) shall not apply to any committee which does not exercise the authority of the board.

(c) Unless the bylaws otherwise provide, the board may delegate to any committee powers as authorized by Section 5210, but may not delegate the powers set forth in paragraphs (1) through (8) of subdivision (a) of this section.

(d) The board shall take such actions regarding audit committees as are required by subdivision (e) of Section 12586 of the Government Code, if applicable.

7212. (a) The board may, by resolution adopted by a majority of the number of directors then in office, provided that a quorum is present, create one or more committees, each consisting of two

or more directors, to serve at the pleasure of the board. Appointments to such committees shall be by a majority vote of the directors then in office, unless the articles or bylaws require a majority vote of the number of directors authorized in the articles or bylaws. The bylaws may authorize one or more committees, each consisting of two or more directors, and may provide that a specified officer or officers who are also directors of the corporation shall be a member or members of such committee or committees. The board may appoint one or more directors as alternate members of any committee, who may replace any absent member at any meeting of the committee. Any such committee, to the extent provided in the resolution of the board or in the bylaws, shall have all the authority of the board, except with respect to:

(1) The approval of any action for which this part also requires approval of the members (Section 5034) or approval of a majority of all members (Section 5033).

(2) The filling of vacancies on the board or in any committee which has the authority of the board.

(3) The fixing of compensation of the directors for serving on the board or on any committee.

(4) The amendment or repeal of bylaws or the adoption of new bylaws.

(5) The amendment or repeal of any resolution of the board which by its express terms is not so amendable or repealable.

(6) The appointment of committees of the board or the members thereof.

(7) The expenditure of corporate funds to support a nominee for director after there are more people nominated for director than can be elected.

(8) With respect to any assets held in charitable trust, the approval of any self-dealing transaction except as provided in paragraph (3) of subdivision (d) of Section 5233.

(b) Subdivision (a) shall not apply to any committee which does not exercise the authority of the board.

(c) Unless the bylaws otherwise provide, the board may delegate to any committee, appointed pursuant to paragraph (4) of subdivision (c) of Section 7151 or otherwise, powers as authorized by Section 7210, but may not delegate the powers set forth in paragraphs (1) through (8) of subdivision (a) of this section.

(d) Where a corporation holds assets in charitable trust, the board shall take such actions regarding audit committees as are required by subdivision (e) of Section 12586 of the Government Code, if applicable.

9212. (a) Subject to any provision in the articles or bylaws: (i) the board may, by resolution adopted by a majority of the number of directors then in office, provided that a quorum is present, create one or more committees, each consisting of two or more directors, to serve at the pleasure of the board; and (ii) appointments to such committees shall be by a majority vote of the directors then in office. The bylaws may authorize one or more committees, each consisting of two or more directors, and may provide that a specified officer or officers who are also directors of the corporation shall be a member or members of such committee or committees. The board may appoint one or more directors as alternate members of any committee, who may replace any absent member at any meeting of the committee. Any such committee, to the extent provided in the resolution of the board or in the bylaws, shall have all the authority of the board, except with respect to:

(1) The approval of any action for which this part also requires approval of the members (Section 5034) or approval of a majority of all members (Section 5033).

(2) The filling of vacancies on the board or in any committee which has the authority of the board.

(3) The fixing of compensation of the directors for serving on the board or on any committee.

(4) The amendment or repeal of bylaws or the adoption of new bylaws.

(5) The amendment or repeal of any resolution of the board which by its express terms is not so amendable or repealable.

(6) The appointment of committees of the board or the members thereof.

(b) Subdivision (a) shall not apply to any committee which does not exercise the authority of the board.

(c) Unless the bylaws otherwise provide, the board may delegate to any committee powers as authorized by Section 9210, but may not delegate the powers set forth in paragraphs (1) through (6) of subdivision (a) of this section.

(d) The board shall take such actions regarding audit committees as are required by subdivision (e) of Section 12586 of the Government Code, if applicable.

5213. (a) A corporation shall have a chairman of the board or a president or both, a secretary, a chief financial officer and such other officers with such titles and duties as shall be stated in the bylaws or determined by the board and as may be necessary to enable it to sign instruments. The president, or if there is no president the chairman of the board, is the general manager and chief executive officer of the corporation, unless otherwise provided in the articles or bylaws. Any number of offices may be held by the same person unless the articles or bylaws provide otherwise, except that neither the secretary nor the chief financial officer may serve concurrently as the president or chairman of the board. *Any compensation of the president or chief executive officer and the chief financial officer or treasurer shall be determined in accordance with subdivision (g) of Section 12586 of the Government Code, if applicable.*

7213. (a) A corporation shall have a chairman of the board or a president or both, a secretary, a chief financial officer and such other officers with such titles and duties as shall be stated in the bylaws or determined by the board and as may be necessary to enable it to sign instruments. The president, or if there is no president the chairman of the board, is the general manager and chief executive officer of the corporation, unless otherwise provided in the articles or bylaws. Any number of offices may be held by the same person unless the articles or bylaws provide otherwise. *Where a corporation holds assets in charitable trust, any compensation of the president or chief executive officer and the chief financial officer or treasurer shall be determined in accordance with subdivision (g) of Section 12586 of the Government Code, if applicable.*

(b) Except as otherwise provided by the articles or bylaws, officers shall be chosen by the board and serve at the pleasure of the board, subject to the rights, if any, of an officer under any contract of employment. Any officer may resign at any time upon written notice to the corporation without prejudice to the rights, if any, of the corporation under any contract to which the officer is a party.

9213. (a) A corporation shall have a chairman of the board or a president or both, a secretary, a chief financial officer and such other officers with such titles and duties as shall be stated in the bylaws or determined by the board and as may be necessary to enable it to sign instruments. The president, or if there is no president, the chairman of the board, is the general manager and chief

executive officer of the corporation, unless otherwise provided in the articles or bylaws. Any number of offices may be held by the same person unless the articles or bylaws provide otherwise, except that neither the secretary nor the chief financial officer may serve concurrently as the president or chairman of the board. *Any compensation of the president or chief executive officer and the chief financial officer or treasurer shall be determined in accordance with subdivision (g) of Section 12586 of the Government Code, if applicable.*

(b) Except as otherwise provided by the articles or bylaws, officers shall be chosen by the board and serve at the pleasure of the board, subject to the rights, if any, of an officer under any contract of employment. Any officer may resign at any time upon written notice to the corporation without prejudice to the rights, if any, of the corporation under any contract to which the officer is a party.

5235. (a) The board may fix the compensation of a director, as director or officer, and no obligation, otherwise valid, to pay such compensation shall be voidable merely because the persons receiving the compensation participated in the decision to pay it, unless it was not just and reasonable as to the corporation at the time it was authorized, ratified or approved. *The board shall take such other actions as are required by subdivision (g) of Section 12586 of the Government Code, if applicable.*

(b) In the absence of fraud, any liability under this section shall be limited to the amount by which the compensation exceeded what was just and reasonable, plus interest from the date of payment.

6321. (a) Except as provided in subdivision (c), (d), or (f), the board shall cause an annual report to be sent to the members not later than 120 days after the close of the corporation's fiscal year. Unless otherwise provided by the articles or bylaws and if approved by the board of directors, that report and any accompanying material sent pursuant to this section may be sent by electronic transmission by the corporation (Section 20). That report shall contain in appropriate detail the following:

(1) The assets and liabilities, including the trust funds, of the corporation as of the end of the fiscal year.

(2) The principal changes in assets and liabilities, including trust funds, during the fiscal year.

(3) The revenue or receipts of the corporation, both unrestricted and restricted to particular purposes, for the fiscal year.

(4) The expenses or disbursements of the corporation, for both general and restricted purposes, during the fiscal year.

(5) Any information required by Section 6322.

(b) The report required by subdivision (a) shall be (i) accompanied by any report thereon of independent accountants, or, if there is no such report, the certificate of an authorized officer of the corporation that such statements were prepared without audit from the books and records of the corporation and (ii) *if applicable, prepared and made available in the manner required by paragraph (1) of subdivision (e) of Section 12586 of the Government Code.*

(c) Subdivision (a) does not apply to any corporation which receives less than twenty-five thousand dollars (\$25,000) in gross revenues or receipts during the fiscal year.

(d) Where a corporation has provided, pursuant to Section 5510, for regular meetings of members less often than annually, then the report required by subdivision (a) need be made to

members only with the frequency with which regular membership meetings are required, unless the articles or bylaws require a report more often.

(e) Subdivisions (c) and (d) notwithstanding, a report with the information required by subdivision (a) shall be furnished annually to:

- (1) All directors of the corporation; and
- (2) Any member who requests it in writing.

(f) A corporation which in writing solicits contributions from 500 or more persons need not send the report otherwise required by subdivision (a) if it does all of the following:

(i) Includes with any written material used to solicit contributions a written statement that its latest annual report will be mailed upon request and that such request may be sent to the corporation at a name and address which is set forth in the statement.

The term "annual report" as used in this subdivision refers to the report required by subdivision (a).

(ii) Promptly mails a copy of its latest annual report to any person who requests a copy thereof; and

(iii) Causes its annual report to be published not later than 120 days after the close of its fiscal year in a newspaper of general circulation in the county in which its principal office is located.

8321. (a) A corporation shall notify each member yearly of the member's right to receive a financial report pursuant to this subdivision. Except as provided in subdivision (c), upon written request of a member, the board shall promptly cause the most recent annual report to be sent to the requesting member. An annual report shall be prepared not later than 120 days after the close of the corporation's fiscal year. Unless otherwise provided by the articles or bylaws and if approved by the board of directors, that report and any accompanying material may be sent by electronic transmission by the corporation (Section 20). That report shall contain in appropriate detail the following:

(1) A balance sheet as of the end of that fiscal year and an income statement and a statement of cashflows for that fiscal year.

(2) A statement of the place where the names and addresses of the current members are located.

(3) Any information required by Section 8322.

(b) The report required by subdivision (a) shall be (i) accompanied by any report thereon of independent accountants, or, if there is no such report, the certificate of an authorized officer of the corporation that such statements were prepared without audit from the books and records of the corporation *and (ii) if applicable, prepared and made available in the manner required by paragraph (1) of subdivision (e) of Section 12586 of the Government Code.*

(c) Subdivision (a) does not apply to any corporation that receives less than ten thousand dollars (\$10,000) in gross revenues or receipts during the fiscal year.

6324. (a) Nothing in this part relieves a corporation from the requirements of Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of the Government Code *including, without limitation, subdivision (a) of Section 12586.* If a report sent to the Attorney General in compliance with the requirements of Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of the Government Code includes the information required in the annual report, then the corporation may furnish a copy of its report to the Attorney General in lieu of the annual report, whenever it is required to furnish an annual report.

(b) A corporation shall furnish any member who so requests a copy of any report filed by the corporation pursuant to Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of the Government Code. The corporation may impose reasonable charges for copying and mailing a report furnished under this subdivision.

8324. (a) Nothing in this part relieves a corporation from the requirements of Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of the Government Code **as to any assets held in charitable trust** including, without limitation, subdivision (a) of Section 12586. *If a report sent to the Attorney General in compliance with the requirements of Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of the Government Code includes the information required in the annual report, then the corporation may furnish a copy of its report to the Attorney General in lieu of the annual report, whenever it is required to furnish an annual report.*

(b) A corporation shall furnish any member who so requests a copy of any report filed by the corporation pursuant to Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of the Government Code. The corporation may impose reasonable charges for copying and mailing a report furnished under this subdivision.

18300. (a) It is the intent of the Legislature to enact legislation relating to the governance of unincorporated associations.

(b) *Unincorporated associations holding property for charitable purposes shall comply with the Supervision of Trustees and Fundraisers for Charitable Purposes Act, Article 7 of Chapter 6, Part 2, Division 3 of Title 2 of the Government Code (Sections 12580 through 12599.7), if applicable.*

Comment: Present Section 18300 of Article 1 of Chapter 6 of Title 3 of the Corporations Code is reserved by the Legislature for legislation relating to the governance of unincorporated associations. In 2004, unincorporated associations which hold property for charitable purposes, subject to certain exceptions, were explicitly brought within the regulatory oversight of the Attorney General by the Nonprofit Integrity Act of 2005 (Sections 12850 through 12599 of the Government Code, as amended). That Act imposes certain reporting, governance and other duties upon such unincorporated associations including but not limited to the preparation of annual audited financial reports using generally accepted accounting principles and the governing board's review and approval of the compensation of the president or chief executive officer and chief financial officer or treasurer. This proposed amendment would serve the purpose of alerting practitioners to the existence of important laws affecting unincorporated associations outside of the Corporations Code.

3. Sections 5914 et seq. Health Facilities – Lisa Runquist and Brad Clark – approved w/o change

Sections 5914 *et seq.* impose specific filing requirements on corporations operating or controlling health facilities (as defined). These sections include religious corporations and mutual benefit organizations as well as public benefit corporations -- they cover "any nonprofit corporation that is defined in Corp. Code § 5046" (which defines public benefit, mutual benefit and religious corporations) that owns or controls certain health facilities. However, there are no

cross references in the 7000 or 9000 laws that would incorporate these sections by reference and thereby call attention to them. Also, apparently, Sections 5915 through 5919 appear to apply only to public benefit corporations and 5920 through 5924 appear to apply to all three types of corporations (rather duplicatively as to public benefit corporations). The cross references are necessary; otherwise a mutual benefit or religious organization might not even know that they are covered, and go merrily on its way without making the possibly requisite filings. The following proposed sections are intended to supply the necessary cross-references.

7914. *The provisions of Article 2 (commencing with § 5914 of Chapter 9 of Part 2) apply to mutual benefit corporations to the extent provided therein.*

9634. *The provisions of Article 2 (commencing with § 5914 of Chapter 9 of Part 2) apply to religious corporations to the extent provided therein.*

4. Section 9250 Investment Standards – Pat Whaley – approved

Probate Code section 18508 as it read until January 1, 2009 (old UMIFA), provided that “[n]othing in this part alters the status of governing boards, or the duties and liabilities of directors, under other laws of this state.” This brought into play not only Corp. Code sections 5231 and 5240 but also Corp. Code sections 9241 and 9250 in the case of religious corporations. UPMIFA eliminated this section. S1329, which enacted UPMIFA in California, also amended Corp. Code section 5240, but nothing was done about religious corporations.

To remedy this, it appears to me that section 9250 could be revised to make the present language thereof subdivision (a) and a new subdivision (b) be added to read:

9250. (a) In investing, reinvesting, purchasing, acquiring, exchanging, selling, and managing a corporation’s investments, the board shall meet the standards set forth in Section 9241.

(b) *Nothing in this section shall be construed to preclude the application of the Uniform Prudent Management of Institutional Funds Act (Part 7 (commencing with Section 18501) of Division 9 of the Probate Code) if that act would otherwise be applicable, but nothing in the Uniform Prudent Management of Institutional Funds Act alters the status of governing boards, or the duties and liabilities of directors, under this Part.*

5. Section 25100(j) Exception to Securities – Martin Trupiano – approved pending consultation with Corporations Commission

A security, as defined in Section 25019, includes membership in an incorporated or unincorporated association. Under Section 25100(j), the exemption for nonprofits does not apply to the securities of any nonprofit if any promoter expects to be remunerated by the organization or to make a profit from the organization’s activities. The promoter is often considered to be the incorporator. The SEC has held that membership interests in a nonprofit mutual benefit corporation are not securities if members are not entitled to share in any income generated or receive dividends or distributions of any kind from the organization except on liquidation. This might be a simpler solution and avoid unintended consequences when the incorporator is compensated by the organization.

25100. The following securities are exempted from Sections 25110, 25120, and 25130:

(a) Any security (including a revenue obligation) issued or guaranteed by the United States, any state, any city, county, city and county, public district, public authority, public corporation, public entity, or political subdivision of a state or any agency or corporate or other instrumentality of any one or more of the foregoing; or any certificate of deposit for any of the foregoing.

(b) Any security issued or guaranteed by Canada, any Canadian province, any political subdivision or municipality of that province, or by any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor; or any certificate of deposit for any of the foregoing.

(c) Any security issued or guaranteed by and representing an interest in or a direct obligation of a national bank or a bank or trust company incorporated under the laws of this state, and any security issued by a bank to one or more other banks and representing an interest in an asset of the issuing bank.

(d) Any security issued or guaranteed by a federal savings association or federal savings bank or federal land bank or joint land bank or national farm loan association or by any savings association, as defined in subdivision (a) of Section 5102 of the Financial Code, which is subject to the supervision and regulation of the Commissioner of Financial Institutions of this state.

(e) Any security (other than an interest in all or portions of a parcel or parcels of real property which are subdivided land or a subdivision or in a real estate development), the issuance of which is subject to authorization by the Insurance Commissioner, the Public Utilities Commission, or the Real Estate Commissioner of this state.

(f) Any security consisting of any interest in all or portions of a parcel or parcels of real property which are subdivided lands or a subdivision or in a real estate development; provided that the exemption in this subdivision shall not be applicable to: (1) any investment contract sold or offered for sale with, or as part of, that interest, or (2) any person engaged in the business of selling, distributing, or supplying water for irrigation purposes or domestic use that is not a public utility except that the exemption is applicable to any security of a mutual water company (other than an investment contract as described in paragraph (1)) offered or sold in connection with subdivided lands pursuant to Chapter 2 (commencing with Section 14310) of Part 7 of Division 3 of Title 1.

(g) Any mutual capital certificates or savings accounts, as defined in the Savings Association Law, issued by a savings association, as defined by subdivision (a) of Section 5102 of the Financial Code, and holding a license or certificate of authority then in force from the Commissioner of Financial Institutions of this state.

(h) Any security issued or guaranteed by any federal credit union, or by any credit union organized and supervised, or regulated, under the Credit Union Law.

(i) Any security issued or guaranteed by any railroad, other common carrier, public utility, or public utility holding company which is (1) subject to the jurisdiction of the Interstate Commerce Commission or its successor or (2) a holding company registered with the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935 or a subsidiary of that company within the meaning of that act or (3) regulated in respect of the issuance or guarantee of the security by a governmental authority of the United States, of any state, of Canada or of any Canadian province; and the security is subject to registration with or authorization of issuance by that authority.

(j) Any security (except evidences of indebtedness, whether interest bearing or not) of an issuer (1) organized exclusively for educational, benevolent, fraternal, religious, charitable, social, or reformatory purposes and not for pecuniary profit, if no part of the net earnings of the issuer inures to the benefit of any private shareholder or individual, *if at all, except upon liquidation*, or (2) organized as a chamber of commerce or trade or professional association. The fact that amounts received from memberships or dues or both will or may be used to construct or otherwise acquire facilities for use by members of the nonprofit organization does not disqualify the organization for this exemption.

This exemption does not apply to the securities of any nonprofit organization if any promoter thereof expects or intends to make a profit directly or indirectly from any business or activity associated with the organization or operation of that nonprofit organization or from remuneration received from that nonprofit organization, *except for compensation reviewed and approved as just and reasonable by its disinterested directors or members of its governing body*.

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6. Section 31005(c) Exception to Franchise – Cherie Evans and Lisa Runquist – approved w/o change

Corporations Code Section 31005(a) defines franchise as an agreement by which: (1) a franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by franchisor; (2) the operation of the franchisee's business is substantially associated with franchisor's trademark, service mark or trade name; and (3) the franchisee is required to pay a franchise fee. Currently, the only exception to the definition of a franchise specifically for nonprofits is for a nonprofit operated on a cooperative basis by and for independent retailers which wholesales goods and services primarily to its member retailers. It seems like there should be a broader exception for certain types of nonprofits.

31005. (a) "Franchise" means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:

(1) A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor; and

(2) The operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate; and

(3) The franchisee is required to pay, directly or indirectly, a franchise fee.

(b) For the purposes of this division, the term "franchise" also means the following:

(1) Any contractual agreement between a petroleum corporation or distributor and a gasoline dealer, or between a petroleum corporation and distributor, under which the petroleum distributor or the gasoline dealer is granted the right to use a trademark, trade name, service mark, or other identifying symbol or name owned by the other party to the agreement, or any agreement between a petroleum corporation or distributor and a gasoline dealer, or between a petroleum corporation and distributor, under which the petroleum distributor or the gasoline dealer is granted the right to occupy premises owned, leased, or controlled by the other party to

the agreement, for the purposes of engaging in the retail sale of petroleum and other products of the other party to the agreement.

(2) Any contract between a refiner and a petroleum distributor, between a refiner and a petroleum retailer, between a petroleum distributor and another petroleum distributor, or between a petroleum distributor and a petroleum retailer, under which a refiner or petroleum distributor authorizes or permits a petroleum retailer or petroleum distributor to use, in connection with the sale, consignment, or distribution of gasoline, diesel, gasohol, or aviation fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies fuel to the petroleum distributor which authorizes or permits such use. The term "franchise" as defined in this paragraph includes the following:

(A) Any contract under which a petroleum retailer or petroleum distributor is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies fuel to the petroleum distributor which authorizes or permits such occupancy.

(B) Any contract pertaining to the supply of fuel which is to be sold, consigned, or distributed under a trademark owned or controlled by a refiner, or under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, fuel was sold, consigned, or distributed under a trademark owned and controlled on such date by a refiner.

(C) The unexpired portion of any franchise, as defined by the preceding provisions of this subdivision, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of state law which permits such transfer or assignment without regard to any provision of the franchise.

(c) For purposes of this division, the term "franchise" does not include a nonprofit organization operated on a cooperative basis by and for independent retailers which wholesales goods and services primarily to its member retailers and to which all of the following is applicable:

(1) Control and ownership of each member is substantially equal.

(2) Membership is limited to those who will avail themselves of the services furnished by the organization.

(3) Transfer of ownership is prohibited or limited.

(4) Capital investment receives no return.

(5) Substantially equal benefits pass to the members on the basis of patronage of the organization.

(6) Members are not personally liable for obligations of the organization in the absence of a direct undertaking or authorization by them.

(7) Services of the organization are furnished primarily for the use of the members.

(8) Each member and prospective member is provided with an offering circular which complies with the specifications of Section 31111.

(9) No part of the receipts, income, or profit of the organization is paid to any profitmaking entity, except for arms-length payments for necessary goods and services, and members are not required to purchase goods or services from any designated profitmaking entity.

(d) The nonprofit organization is subject to an action for rescission or damages under Section 3343.7 of the Civil Code if the organization fraudulently induced the plaintiff to join the organization.

(d) For purposes of this division, the term “franchise” does not include an agreement between two or more nonprofit organizations that are exempt from federal income taxation under Section 501(c)(3), 501(c)(4), 501(c)(5), or 501(c)(6) of the Internal Revenue Code.

7. Business & Professions Code Section 17510.5 GAAP for Soliciting Organizations –
Cherie Evans – not voted on

Section 17510.5 currently requires the financial records of a soliciting organization to be maintained on the basis of generally accepted accounting principles. This requires them to be kept on an accrual basis, which may be difficult for some of the smaller organizations.

Belinda Johns noted that because 17510.5 is interrelated with the disclosure requirements of Gov. Code sec. 12599(j), the Attorney General’s Office is concerned that allowing cash accounting for disclosure purposes would allow for manipulation of the percentage going to charity. She was not sure about deleting subsection (b). Section 17510.3(a)(7), which is referenced in subsection (b), has been deleted from the code. However, she wanted to make sure that there wasn’t some other disclosure requirement that should be referenced in subsection (b).

~~**17510.5.** (a) The financial records of a soliciting organization shall be maintained on the basis of generally accepted accounting principles as defined by the American Institute of Certified Public Accountants, the Governmental Accounting Standards Board, or the Financial Accounting Standards Board.~~

~~–(b) The disclosure requirement of paragraph (7) of subdivision (a) of Section 17510.3 shall be based on the same accounting principles used to maintain the soliciting organization's financial records.~~

8. Civil Code Section 1616 Consideration and Charitable Pledges – Pat Whaley – approved w/changes

It is proposed that a new Section 1616 be added to the California Civil Code to read:

1616. *A promise to make a gift, bequest or devise of cash or other property to an organization described in section 501(c)(3) of the Internal Revenue Code is contractually binding with or without consideration if the promisor indicated in writing an intent that the promise be a binding legal obligation.*

The problem which this section would address is that charitable pledges are not enforceable in California unless the pledgor receives consideration for making the pledge. In many situations there is no such consideration. In others, its existence is uncertain. Uncertainty can lead to litigation. Also, the Internal Revenue Service will examine a pledge to determine if it is enforceable and thus deductible for federal estate tax purposes. (See LTR 9718031 issued by the IRS on February 4, 1997.) Moreover, Statement of Financial Accounting Standards No. 116 requires that nonprofit organizations book charitable pledges as income whether or not they are legally enforceable which can result in a distortion of income if pledges are not honored because they are not legally enforceable although such distortion may be ameliorated by a reserve for uncollectable pledge.

To be enforceable a pledge agreement must be a valid contract. Section 90(2) of the Second Restatement of Contracts, one of the leading authorities consulted with respect to contract law, takes the modern position that no consideration need be furnished by the charitable pledgee to the pledgor in order for a pledge to be an enforceable contract. Some courts have adopted this position. Others have not and continue to hold to the traditional position that a mere promise to make a charitable gift is unenforceable.¹ While it is possible that, in the future, California courts might follow the Restatement, the California courts have historically required some form of consideration. University of Southern California v. Bryson, 103 CA 39 (1929); Bd. of Home Missions v. Manley, 129 CA 541 (1933); Calvary Presbyterian Church v. Brydon, 4 CA 2d 676 (1935); First Trust & Savings Bank v. Coe College, 8 CA 2d 195 (1935).

The mere recitation of consideration in a contract that there is good and valuable consideration at best creates a rebuttable presumption that there was in fact sufficient consideration. On the other hand, it is possible that, although there is no written instrument identifying consideration, other evidence would demonstrate that it is present.

Consideration which has been judicially recognized as valid by California courts usually takes one or both of the following forms:

1. The gift is specifically made in consideration of other donors making gifts so that there is mutual consideration flowing between donors. University of Southern California v. Bryson, *supra*; Calvary Presbyterian Church v. Brydon, *supra*.
2. The charity unconditionally obligates itself in some manner such as promising to build a building named after the pledgor or to establish a scholarship fund in his or her name. Buchtel College v. Chamberloix, 3 CA 246 (1906). First Trust & Savings Bank v. Coe College, *supra*.

In some cases, the courts have held that the pledgor is estopped from denying the existence of a contract because the charity has detrimentally relied on the pledgor's promise to make a charitable contribution. In such cases, the charities have been able to demonstrate that they have incurred significant costs or obligations in reliance of the promised gifts such as having begun the construction of a building. University of Southern California v. Bryson, *supra*.

California could resolve the problem by adopting proposed Section 1616 as set forth above.

¹ The issue of the enforceability of pledge agreements was addressed by the New York University School of Law Program on Philanthropy and the Law. Its report was published in 27 University of San Francisco Law Review 47 (1992-93). This article also discusses the duty of a charitable organization to enforce a pledge. There is also a survey of case law on the subject reported in 97 ALR 3d 1054.